MALAYSIAN REPORTS

DERAMAN & ORS. v. MEK YAM

[F.C. (Suffian L.P., Ali and Ong Hock Sim F.JJ.) October 16, 1976]

[Kota Bharu — Federal Court Civil Appeal No. 130 of 1974]

Land Law — Land registered under possessory title in name of defendant — Whether plaintiff can apply to High Court to claim that he is entitled to the land — Death of owner — No letters of administration taken out — Locus standi — Kelantan Land Settlement Ordinance, 1955, ss. 6, 7, 8, 10 and 16.

This was an appeal from the decision of Abdul Razak J. ([1975] 1 M.L.J. 142). There had been a Land Scheme Enquiry and the land had been registered in the name of the defendant under a possessory title. The plaintiffs who were the children of the original owner did not appeal from that decision but they brought an action purportedly under section 10(1)(a) of the Kelantan Land Settlement Ordinance claiming that they were entitled to a share in the land. The learned trial judge dismissed the application, and the plaintiffs appealed. The plaintiffs had not taken out letters of administration to the estate of their father.

Held, (Ali and Ong Hock Sim F.JJ., Suffian L.P. dissenting): (1) the learned trial judge was right in holding that if a person is aggrieved by the Land Officer's decision then his avenue for redress is not to invoke section 10 but to file an appeal under section 16 of the Kelantan Land Settlement Ordinance;

(2) the action by the appellants in this case was by no means an action to establish a superior title. It was nothing more than an attempt to challenge the correctness of the District Officer's decision and the registration of the possessory title and this they could only do by way of an appeal;

(3) in any event the appellants had not taken out representation to their father's estate and had no *locus standi* to institute the action.

Cases referred to:-

(1) *Fatimah* v. *Wok* [1964] M.L.J. 318.
(2) *Mamat & Ors.* v. *Mahmood* [1961] M.L.J. 167.
(3) *Mohamed bin Senik* v. *Nik Mek* [1975] 1 M.L.J. 169.
(4) *Wok* v. *Fatimah* [1964] M.L.J. 35.
(5) *Mat'ail* v. *Mek* [1961] M.L.J. 15.

FEDERAL COURT.

A. Gomez for the appellants.

Respondent in person.

Datuk Idris bin Yusuf, Legal Adviser, Kelantan as *amicus curiae*.

Suffian L.P.: There are three judgments in this appeal. In their absence I shall read first the judgment of my brother Tan Sri Ali Hassan and then that of my brother Tan Sri H.S. Ong, followed finally by my own.

Ali F.J. (read by Suffian L.P.): The dispute in this appeal is over a 5/10 undivided share in a piece of land described as Lot 1605 Mukim Bunchan, Tumpat, Kelantan. It arose out of a finding or order under section 8 of the Kelantan Land Settlement Ordinance No. 51 of 1955 (hereinafter referred to as the Ordinance) in a land enquiry held pursuant to section 5 which requires the following to be ascertained:

(a) who was in possession of the land;

(b) who was the registered proprietor thereof;

(c) who was entitled to be registered as proprietor; and

(d) whether any person has a registrable interest in the land and, if so, the extent of the land over which such interest is exercisable.

It seems established at the enquiry that the defendant, Ibrahim bin Mamat, was in possession of the land and that the registered proprietor of an undivided share thereof was Din bin Salleh, the appellants' deceased father. The defendant's claim at the enquiry was that he had bought the portion of land in his possession from the deceased. Under section 8 of the Ordinance a finding to the effect that the person is in possession of land otherwise than holding under the proprietor would entitle him to be furnished with the appropriate document of possessory title. In the instant case it was common ground that the defendant succeeded in his claim at the enquiry held sometime in 1970 and that 5/13 undivided share in the land was ordered to be registered in his name.

One of the appellants, Harun bin Din, appealed against the finding to the District Officer under section 16(1) of the Ordinance but was unsuccessful. The District Officer ordered 5/10 instead of 5/13 of the undivided share in the land to be registered in the defendant's name. Under the said section the appellants could have further appealed against the order to the High Court but they did not.

After nearly two years, in February 1972, they commenced action in the High Court asking for an order that the said 5/10 undivided share be registered in their names as lawful beneficiaries of the estate of Din bin Salleh. It was undoubtedly an attempt to get the court to set aside the order of the District Officer well after the period of appeal has lapsed. Section 418 of the National Land Code (hereinafter referred to as the Code) which governs such appeals provides for a period of three months. In the event the question which arose was whether the appellants could maintain such an action It was not raised by the defendant as he was not represented by counsel. As far as he was concerned the action was just a kind of an appeal against the decision of the District Officer for in paragraph 3 of his defence he said that the decision of the District Officer was a fair decision.

The learned judge, Abdul Razak J., who raised the question said in his judgment:

"In my view if a person is aggrieved by the Land Officer's decision at the Scheme Enquiry then his avenue for redress is not to invoke section 10 but to file an appeal under section 16, otherwise it is impossible to see how section 10 could be made to operate without the one offending the other."

Section 10 of the Ordinance provides, *inter alia*:

"(1) Where a possessory title has been registered—

(a) no suit, action or proceeding under the Code or otherwise may be brought by any person to establish any claim to ownership of or interest in the land if such claim existed prior to the date of the registration of possessory titles unless such suit, action or proceeding is commenced before the expiration of three years from the date of such registration;"

Counsel for the appellants submitting that it could be invoked cited the case of *Fatimah* v. *Wok*[1] as authority for the proposition that notwithstanding the dismissal of an appeal against the decision of the District Officer the appellants could still bring an action for the same relief provided the action is brought within 3 years from the registration of possessory title.

It is necessary to be absolutely clear as to the relief sought by Wok in the appeal which was heard by Hepworth J. (as he then was) and the relief sought in the action which was heard by the late Hashim J. In the appeal which was decided by Hepworth J. Wok had appealed against the finding of the District Officer made under section 8 of the Ordinance, which finding had led to Fatimah being registered as holder of possessory title under the Ordinance. In effect the appeal was against the registration of possessory title. The judgment of the Federal Court clearly says that the dismissal of the appeal was right. Following such dismissal, however, Wok brought an action to establish her ownership of the land in dispute. The action was not to set aside the order of the District Officer or the registration of possessory title as in the present case but to establish a title superior to the registered possessory title. In view of the fact that Wok had such superior title judgment was entered in her favour. Fatimah's appeal against the judgment was, in my opinion, rightly dismissed by the Federal Court.

The action by the appellants in this case is by no means an action to establish a superior title. As I have stated it is nothing more than an attempt to challenge the correctness of the District Officer's decision or the registration of possessory title. Such an action is not within the contemplation of section 10(1)(a) of the Ordinance particularly in view of the words "Where a possessory title has been registered". Quite clearly the appellants have no cause of action and that in terms of Order 25 rule 4 the learned judge could have dismissed the action not only because it disclosed no reasonable cause of action but also because it was frivolous or vexatious. To involve the defendant in unnecessary litigation was clearly frivolous or vexatious. Furthermore, the appellants have no legal title. They never had. They are only beneficiaries of their father's estate. The only person who could have legal title after their father's death would be the legal representatives of the estate. There was no evidence of any legal representatives having been appointed. On that ground also the appellants have no right to bring an action under section 10(1)(a) of the Ordinance. The action ought to have been dismissed as the appellants have no right or cause of action.

For these reasons I would vary the order directing the action to be held *de novo* by substituting with an order that the action be dismissed. I do this on the principle that there must be finality or an end to litigation.

Accordingly I would dismiss the appeal.

Ong Hock Sim F.J. (read by Suffian L.P.): As stated by the Lord President, the sole issue is whether the appellants had the right to institute proceedings in the High Court in respect of land, their claim to which had been adjudicated by the District Officer in a public inquiry held under section 5 of the Kelantan Land Settlement Ordinance, 1955 against a person in whose favour the District Officer has decided and who had, pursuant to that decision, been issued with a possessory title under section 8(1) instead of appealing against the order of the District Officer as provided by section 16.

Section 10(1) enacts that action must be instituted within three years of the registration of a possessory title by any person to establish any claim to ownership of, or interest in, the land, if such claim existed prior to the date of the registration of the possessory title.

The appellants made no allegations with regard to the Settlement Scheme Enquiry. They were aware of the order of the District Officer of January 7, 1970, and revised on March 10, 1970. (See paragraphs 5 and 6 of the Statement of Claim). It is equally obvious that they are claiming as lawful children of Din bin Salleh the 5/10 undivided share in the name of the defendant, Ibrahim bin Mamat (see paragraph 7 of the Statement of Claim), following proceedings duly taken in accordance with the Ordinance.

It is equally clear that they are persons aggrieved by an order made in pursuance of the Ordinance and section 16(1) provides for an appeal from such order to the District Officer, and thereafter to the High Court, in the manner prescribed by section 418 of the National Land Code.

It seems to me that it cannot be open to the appellants to elect to ignore section 16 by purporting to proceed under section 10(1) which is merely declaratory of the effect of a possessory title. As the learned judge said, "In my view, if a person is aggrieved by the Land Office's decision at the Scheme Enquiry, then his avenue for redress is not to invoke section 10 but to file an appeal under section 16". I agree.

Section 418 of the National Land Code enacts that an appeal to the court must be brought within three months from the date of communication of the order of the District Officer, though the High Court has power to extend the period of time upon special grounds being shown.

The possessory title can be extinguished under section 10(1)(b), upon proof of entitlement to be registered as proprietor by a claimant challenging the holder of the possessory title. I am doubtful, despite *Fatimah* v. *Wok*[1] and reading the Ordinance as a whole, that it is open to a person who is entitled to appeal under section 16, to retry the issue afresh by instituting action under section 10(1)(a). That action, in my view, can be taken within 3 years only by a person who had a claim to ownership or interest in the land prior to the date of registration and who had not taken steps to establish such claim before the District Officer.

As was pointed out by my brother Ali F.J. the appellants had not taken out representation and had therefore no *locus standi* to institute the action.

I agree with him that this appeal be dismissed and with the order proposed by him.

Suffian L.P.: The issue in this appeal is this: may a person who has appeared before the District Officer investigating a claim in a public enquiry held under section 5 of the Kelantan Land Settlement Ordinance, 1955 (the "Ordinance") and whose claim has been adjudicated by the District Officer pursue his claim

by bringing fresh proceedings, namely by suing in the High Court?

To understand this issue, it is necessary to set out briefly the scheme of the Ordinance.

The Torrens system was invented in Australia and imported into Malaysia to simplify land transactions, but its success depends on the willingness of proprietors and others to have land transactions registered. In Kelantan, however, because of ignorance of the peasantry who form the majority of the population, and possibly also because of shortage of staff and the laxity of many land officers extending over many years, many many land transactions were never entered on the register and it was reported that some 300,000 titles were grossly out of date. Consequently it often happens that A remains on the register for decades, but he is not the owner or even the person in possession. To update the register in the normal way without the consent of all concerned will involve protracted and expensive litigation, which is beyond the means of the peasantry. To make it easy for them, the Federal Legislative Council which then had legislative authority over land matters, in 1955 passed the Ordinance which applies only to Kelantan and then only in areas declared to be settlement areas.

The intention of the Ordinance is set out in its long title as follows:

"to provide for revision of registers, recording of interests in land, settlement of claims, determination of owners, possessory title to land, and issue of documents of title to land, in settlement areas."

The Ruler in Council declares an area as a settlement area by notification in the *Gazette*, section 3, whereupon for a period of six months (which may be extended) the registration of all land dealings in the area is suspended, except in pursuance of orders made under the Ordinance. In the *Gazette* notification the Ruler in Council calls upon any person who claims —

(a) to be a proprietor; or

(b) to have any interest in land

in a settlement area, to submit his claim.

The claimant submits his claim to a Settlement Officer ("S.O.") who records it.

After recording claims, the S.O. reports to the D.O.

At a previously notified place and time the D.O. (or an A.D.O.) holds a public enquiry, usually on the ground, where he adjudicates on these claims. He does not enquire into claims one at a time, but deals with them in groups.

The public enquiry is held under section 5.

The object of the enquiry is given in that section. The enquiry officer is to ascertain —

(a) who is in possession of land;

(b) who is the registered proprietor;

(c) who is entitled to be registered as proprietor;

(d) whether any person has a registrable interest in it, *i.e.*, a registrable interest other than as proprietor; and

(e) the extent of the land over which any interest is exercisable.

The enquiry officer's primary concern is, however, to ascertain who is in actual possession of the land.

Section 7 (which deals with a person in possession who is the proprietor or holds under him) provides that, if the enquiry officer is satisfied that the person in possession of the land at the date of the enquiry —

(a) is the proprietor, or

(b) holds under the proprietor, or

(c) is a person in occupation of state land under approved application in expectation of registration of title, or

(d) holds under such a person,

he makes —

(i) a finding to that effect and

(ii) an order directing the registration of the interest so found.

Thus, if the enquiry officer is satisfied that the person in possession at the date of the enquiry is the proprietor, in due course that person is registered as proprietor. His title is ordinary title and is indefeasible from the word go.

Section 8 on the other hand deals with a person in possession who is neither proprietor nor holds under the proprietor. Its marginal note contains a misprint: the word "person" should read "proprietor". Nevertheless, here too the enquiry officer must primarily ascertain who is in actual possession at the date of the enquiry.

Subsection (1) of that section provides that, if the enquiry officer is satisfied that —

(a) land is registered in the name of a person (say) A,

(b) but another (say) B is in possession otherwise than holding under the proprietor,

the enquiry officer makes —

(i) a finding to that effect and

(ii) an order to be presented to the Land Registrar who then gives possessory title to the person actually in possession, namely B.

Subsection (2) of section 8 deals with a person in possession (say) C who enters into possession by leave or licence of another (say) D. It provides that, if the enquiry officer is satisfied that —

(a) C entered into possession as tenant, chargee or otherwise than as owner and

(b) by leave or licence not of the proprietor but of or on behalf of D who claims to be entitled to such land or any interest in it,

he makes —

(i) a finding to that effect and

(ii) an order to be presented to the Land Registrar who then gives possessory title to D.

In *Fatimah* v. *Wok*[1] it was said at page 319 that the enquiry there was held under section 8. With respect I do not think that that can be right, because all enquiries are held under section 5, whereas sections

7 and 8 refer to the decisions that can be made by the enquiry officer.

With respect I agree with Hepworth J. when he said at page 169 in *Mamat & Ors.* v. *Mahmood*[2] that the word "possession" in sections 7 and 8 means possession in fact and not possession in law for the reasons given by him there.

It will be observed that, though the enquiry officer's primary concern as can be seen from sections 7 and 8 is to ascertain who is in actual possession of the land, he is not however precluded from ascertaining if he can who is entitled to ownership, as is clear from section 7, and I was therefore wrong when I said at page 170 in *Mohamed bin Senik* v. *Nik Mek*[3] that he does not decide title.

I now turn to section 16. That provides that any person aggrieved by an order made under the Ordinance may appeal in the first instance to the D.O. and thereafter to the High Court.

What is the effect of possessory title? It is *provisional* title which becomes indefeasible only after 3 years: this is clear from section 10.

Paragraph (a) of subsection (1) of section 10 provides that "no suit . . under the [land law] or otherwise may be brought by any person to establish any claim to ownership of or interest in the land if such claim existed prior to the date of registration of possessory title unless such suit ... is commenced before the expiration of three years from the date of such registration." (Minors and persons under disability have a longer time limit, see paragraph (d).)

If in that suit etc. (paragraph (b) says) judgment is given for the registration as proprietor in favour of the proprietor or person entitled to be registered as proprietor, the interest of the holder of the possessory title and of his successors and all interests created under it cease from the date of the registration of the judgment; and if (paragraph (c) says) judgment is given in favour of a person claiming any other registrable interest (*i.e.*, other than as proprietor), that interest is registered against the possessory title. Paragraph (e) provides that subject to the right of the proprietor or person entitled to be registered as proprietor or entitled to any other registrable interest to obtain a judgment in accordance with paragraphs (a), (b) and (c), a holder of possessory title or his successor is deemed to be the owner of the land and upon the expiration of the period of three years has an indefeasible title within the meaning of the land law.

Finally subsection (2) of section 10 provides that save as otherwise provided by the Ordinance a possessory title shall be treated in the same manner as any other title.

I now turn to the facts in this case which are as follows:

Din bin Salleh died leaving an undivided share in a piece of land in an area which was subsequently declared to be a settlement area.

There were claims against the land and accordingly the enquiry officer held a public enquiry under section 5. The disputants were on the one hand Ibrahim bin Mamat ("the defendant") who claimed he had bought Din's interest and on the other hand Din's children ("the plaintiffs") who claimed to be beneficiaries of Din's estate. On January 7, 1970, the enquiry officer decided this dispute in favour of the defendant. The plaintiffs were not happy with this order and, as they were entitled to under section 16, they appealed to the D.O. and the D.O. heard this appeal and on March 10, 1970, dismissed it The effect was to give the defendant possessory title. It is common ground that both decisions were made under section 8.

Again the plaintiffs were dissatisfied but instead of making a further appeal this time to the High Court as they could have done under section 16, they brought fresh proceedings, namely by suing in the High Court, claiming against the defendant that their father's share in the land be registered in their name as beneficiaries of their father's estate. The defendant, as he did before the D.O., resisted the claim on the ground that he had bought that share.

The learned trial judge heard the evidence and arguments on July 8, 1974, and reserved judgment.

In the event, on July 20, 1974, he decided that the trial be held *de novo*, that the State Commissioner of Lands be made a party to the action, with liberty to the parties to amend their pleadings if necessary. In a judgment dated January 11, 1975, and reported at (1975) 1 M.L.J. 142 he gave his reasons which may be summarised briefly as follows: the parties had been heard by the D.O., and so they could not bring an action under section 10; they could do so only if they had not been heard by the D.O.

The plaintiffs appeal to us.

Before the hearing of the appeal the defendant died and the court ordered that his place be substituted by his daughter Mek Yam as representative of his estate.

This appeal is complicated by the fact that before filing suit the plaintiffs had not taken out letters of administration and so have no *locus standi*, but nevertheless we are urged to give a ruling on the point decided by the learned trial judge, as there are some 20 similar suits pending the result of this appeal, and what I say below is on the assumption that persons like the plaintiffs here are legal representatives.

With all due respect, assuming that they are legal personal representatives and have *locus standi* I do not think that they are precluded by section 10 from bringing this suit because they have already been heard by the D.O.

In my opinion, paragraph (a) of subsection (1) of section 10 means this:

(1) If you want to attack the validity of possessory title, if your claim existed prior to the registration of the title you must commence suit before the expiration of three years after such registration.

(2) If you sue after that, your suit is statute-barred.

(3) If nobody sues during that period, the possessory title becomes indefeasible.

(4) But a person whose claim came into existence *after* such registration may sue either within three years of the registration or even later provided he sues within the time limited by the Limitation Ordinance.

To my mind the main object of paragraph (a) is to shorten the period during which a possessory title remains only provisional.

I see nothing in it to suggest that the legislature intends that a person whose claim existed prior to the registration of the possessory title and who has unsuccessfully tried to establish his claim before the D.O., should have appealed to the High Court and that if he failed to do so he is precluded from pursuing it by bringing fresh proceedings, namely, by suing in the High Court. The legislature could have debarred him if it had wanted to, but it has not done so, and in the absence of clear words it cannot be assumed that he is deprived of his right of access to the courts. I think that the language of the Ordinance allows an aggrieved party two alternative remedies: he can proceed —

(a) by way of appeal under section 16 or

(b) by way of the institution of fresh proceedings either under section 10 or, in the case of a person whose claim did not exist prior to the registration of the possessory title, otherwise;

and if he fails by way of appeal or if he declines to appeal, he may sue in the High Court.

With respect I am unable to agree with the learned trial judge; on the contrary I agree with Mr. Gomez for the appellants and with Datuk Idris bin Yusof the learned Legal Adviser who appears as *amicus curiae* that the learned trial judge has jurisdiction to hear this suit and if the plaintiffs had *locus standi* the judge could and should have come to definite findings of facts on the evidence instead of ordering the plaintiffs to start afresh.

Hashim J. has held in *Wok* v. *Fatimah*[4] that a person who has unsuccessfully appeared before the D.O. and again on appeal in the High Court, may nevertheless sue for title in the High Court. He rejected the argument that as the plaintiff there had gone through all the steps in the Ordinance the matter was *res judicata* and she could not sue. Hashim J. gave this reason as follows:

"My interpretation of this Ordinance is that all the land officer can do is to give a possessory title to the person who is in possession of the land at the time of the enquiry."

With respect I agree with his conclusion, but not with his reason. As already stated, in my view the enquiry officer has power to decide on title, as is clear from section 7. This case came on appeal to this court, see *Fatimah* v. *Wok*,[5] but it would appear that the defence of *res judicata* was not pursued on appeal; nevertheless, I agree that a person such as the plaintiffs in the instant case can sue in the High Court.

In *Mat'ail* v. *Mek*,[6] respondent was proprietor in possession and was on appeal given by the D.O. ordinary title in accordance with section 7 and appellant appealed to the High Court. In dismissing the appeal (in my respectful view correctly) Hepworth J. said that that did not mean that the "appellant is or was necessarily without remedy. It merely means that in the circumstances which exist in this case the Ordinance is of no use to him." Therefore, the judge added, the dismissal of the appeal was to be without prejudice to any further proceedings which the appellant might be advised to take. It is quite clear that the judge meant that the appellant there could bring a suit to assail the respondent's title in accordance with the Kelantan Land Enactment provision dealing with the indefeasibility of title now contained in section 340 of the National Land Code. Hepworth J. was, however, dealing with an order under section 7, but I am of the opinion that the same is true of challenges to the validity of orders under section 8: a person who has failed in an appeal under section 16 may nevertheless bring fresh proceedings.

The learned judge should not also have ordered the Commissioner of Lands to be joined as a party. It is for plaintiffs to decide whether or not a land officer should be joined as a co-defendant. They may not want to do so, because they may consider that their quarrel is with another, not with him, that he has acted *bona fide* in the exercise of his power as a public officer and that even if they were to win against the main defendant they might lose against the land officer whose costs they may then be ordered to pay, a risk which they do not wish to run.

I would therefore have allowed this appeal.

As however I am in a minority, the order of the court is that this appeal be dismissed, that the order directing the action to be started *de novo* be set aside and that there be substituted for it an order that the action be dismissed.

As regards costs, the appellants and the respondent's personal representative all appeared before us in *forma pauperis*, and in the circumstances we agree that there shall be no order as to costs.

Appeal dismissed.

Solicitors: *Mohamed Yaacob & Gomez.*

DATUK SYED KECHIK BIN SYED MOHAMED v. DATUK YEH PAO TZU & ORS.

[O.C.J. (Yusoff J.) September 9, 1975]
[Kota Kinabalu — Notices of Motion Nos. 460 and 461 of 1975]

Practice and Procedure — Libel — Application for interlocutory injunctions to restrain defendants from further printing, circulating or otherwise publishing the alleged libels.

The plaintiff in these actions applied for interlocutory orders to restrain the defendants their servants and agents and each of them from further writing, printing or circulating or otherwise publishing libels on the plaintiff by caricatures contained in issues of the newspaper owned by the defendants or any similar words or caricatures defamatory of the plaintiff in his offices or otherwise until the trial of this action.

Held: the balance of convenience in this case lay in favour of granting the interlocutory relief sought by the plaintiff.

Cases referred to:-

(1) *Quartz Hill Consolidated Gold Mining Co.* v. *Beall* (1881) L.R. 20 Ch. D. 501.